

**Letter of Findings: 04-20130269**  
**Gross Retail Tax**  
**For the Years 2009, 2009, and 2010**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

**ISSUE**

**I. Gross Retail Tax - Time and Material Contracts.**

**Authority:** IC § 6-2.5-2-1(b); IC § 6-2.5-5-8; IC § 6-8.1-5-1(c); Conklin v. Town of Cambridge City, 58 Ind. 130 (Ind. 1877); Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); [45 IAC 2.2-3-9\(d\)\(1\)](#); [45 IAC 2.2-3-12\(e\)](#); Sales Tax Information Bulletin 60 (July 2006).

Taxpayer argues that it is entitled to a credit for sales tax it paid to vendors on the purchase of materials later resold to Taxpayer's own clients.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state company in the business of selling and repairing heating and air conditioning equipment. Taxpayer conducts business on the basis of both "time and material" and "lump sum contracts."

The Indiana Department of Revenue ("Department") conducted a sales tax audit of Taxpayer's tax returns and business records. The audit resulted in the assessment of additional tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

**I. Gross Retail Tax - Time and Material Contracts.**

**DISCUSSION**

The issue is whether Taxpayer is entitled to a sales tax credit for items purchased from vendors when it later sold those items to Taxpayer's own customers.

Taxpayer provides heating and air conditioning services to Indiana customers and customers outside the state. In doing so, it enters into both "lump sum" and "time and material" contracts.

The Department's audit found that Taxpayer should have been collecting sales tax from its time and material customers. The audit report explains as follows:

The [T]axpayer transferred tangible personal properties on [a] time and material basis without applying the sales tax charge required in a retail transaction for consideration. There is no statutory exemption for the transfer of these goods. As such, these sales are taxable under [45 IAC 2.2-3-12\(e\)](#).

The authority to which audit report cites provides:

A person selling tangible personal property to be used as an improvement to real estate may enter into a completely separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sale of materials must be identifiable as a separate transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material. *Id.*

Taxpayer's written protest argued that the audit "improperly assessed tax on construction materials upon which tax had already been paid . . . ." To the extent that Taxpayer stands by this position, Taxpayer is incorrect. The

law on this issue is clear stating that "the sales tax shall be collected and remitted by such seller on the materials sold for this purpose." *Id.* (Emphasis added).

The rule is restated at Sales Tax Information Bulletin 60 (July 2006), 20060823 Ind. Reg. 060287NRA.

If a construction contractor purchases construction materials pursuant to a time and material contract, the construction contractor is a retail merchant and may purchase the construction material exempt from sales tax but must collect sales tax on the resale of the construction material and remit the sales tax. (Emphasis added).

In order to prevail on any issue raised in its protest, Taxpayer is required under IC § 6-8.1-5-1(c) to prove that the assessment is wrong. "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Id.* In the face of clear Indiana law on this issue, Taxpayer has failed to prove that the audit was incorrect in assessing tax because tax was due from its Indiana customers and Taxpayer was required to collect that tax. ("The retail merchant shall collect the tax as agent for the state." IC § 6-2.5-2-1(b)).

Taxpayer raises a second, but related issue. Taxpayer complains that the audit failed to "consider the credits due to [Taxpayer] when it paid its vendors." As explained by Taxpayer:

While [Taxpayer] did not charge tax to its customers in connection with its time and materials contracts, it was [Taxpayer's] practice to pay sales tax when it acquired the tangible personal property used in its repair and construction business. Property acquired by a contractor for resale is exempt from sales tax.

As authority for its position, Taxpayer cites to [45 IAC 2.2-3-9\(d\)\(1\)](#). The cited provision on which Taxpayer relies is ambiguous in its applicability; a clearer statement of the law is provided at IC § 6-2.5-5-8(b) which states that, "Transactions involving tangible personal property . . . are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property."

Taxpayer is correct; when Taxpayer purchased parts and equipment which it later resold to its customers, it was entitled to purchase those items exempt from Indiana sales tax pursuant to IC § 6-2.5-5-8. To that end, the Audit Division is requested to review the purchase documents - and matching customer invoices - and allow an offset credit for the amount of tax it paid to its Indiana vendors. However, Taxpayer is not entitled to a credit for sales tax paid to vendors not located in Indiana. The exemption on which Taxpayer relies applies to Indiana gross retail tax and the law on interpreting and applying exemption is clear. In applying any tax exemption, "[T]he general rule is that 'tax exemptions are strictly construed in favor of taxation and against the exemption.'" *Indiana Dept. of State Rev. v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). A statute which provides a tax exemption, however is strictly construed against the taxpayer. *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101 (citing *Conklin v. Town of Cambridge City*, 58 Ind. 130, 133 (1877)).

Taxpayer's implied request that it be granted an offset of Indiana sales tax against taxes paid to another state is clearly not "within the exact letter of law."

## FINDING

To the extent that Taxpayer is entitled to a credit for taxes paid to its Indiana vendors, Taxpayer's protest is sustained.

*Posted: 12/31/2014 by Legislative Services Agency*  
An [html](#) version of this document.